ORIGINAL

Louisiana Attorney Disciplinary Board
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Docket# 12-DB-028
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LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: FELIX ANTHONY DEJEAN IV

DOCKET NO. 12-DB-028

REPORT OF THE HEARING COMMITTEE #57

INTRODUCTION

This attorney disciplinary matter arises out of formal charges consisting of one count filed by the Office of Disciplinary Counsel ("ODC") against Felix Anthony DeJean IV ("Mr. DeJean" or "Respondent"). ODC alleges that Respondent is guilty of violating the following Rules of Professional Conduct ("Rule(s)"): Rule 4.4(a) (using means that have not substantial purpose other than to embarrass or burden third persons); Rule 8.4(b) (committing a criminal act, simple assault); and Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice).[1]

PROCEDURAL HISTORY

Formal charges were filed on May 11, 2012 and were served on Respondent on or about May 16, 2012, via certified mail. On May 24, 2012, Mr. Dejean filed an answer to the formal charges through counsel, Leslie J. Schiff. In the answer, Mr. Dejean denies the factual allegations as written and denies violating the Rules.

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[1] **RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS**
(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
RULE 8.4. MISCONDUCT
It is professional misconduct for a lawyer to:
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(b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
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(d) Engage in conduct that is prejudicial to the administration of justice…

The matter proceeded to hearing on September 19, 2012. Deputy Disciplinary Counsel, G. Fred Ours appeared on behalf of ODC. Mr. Dejean appeared along with his attorneys, Leslie J. Schiff and Julie White.

For the following reasons, the hearing committee finds the Office of Disciplinary has not proven by clear and convincing evidence a violation of the rules outlined in its Formal Charges. Therefore, the Committee recommends dismissal of the formal charges against the respondent.

FORMAL CHARGES

The formal charges read, in pertinent part:

> On August 26, 2011 Mitch and Mike Kimble and their attorney, John Madison, met Mr. Dejean and his clients, Shane and Jonathan Grimmett, at Mr. Dejean's law office to attempt to settle a civil construction dispute between the Kimbles and the Grimmetts. About an hour into the meeting Mr. Dejean's demeanor changed, and he made a remark to the Kimbells [sic] to the effect that he (Mr. Dejean) was like Pontius Pilate and was going to crucify the Kimbles, or that he (Mr. Dejean) was going to act like Pontius Pilate and the nail driving five. At that time Mr. Madison stood up and advised his clients, the Kimbles, that it was time to leave. Mr. Dejean then stood, began yelling profanities, and made loud and forceful threats of physical violence toward the Kimbles. Mr. Dejean has a self admitted history of physical altercations and behaviors related to medical and substance abuse problems. Mr. Dejean's prior disciplinary history includes his being placed on probation and being monitored by the Lawyer's Assistance Program for such behavior between November of 2006 and November of 2008.
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> Mr. Dejean's inappropriate and violent outburst and behavior on August 26, 2011 involved using means that have no substantial purpose other than to embarrass or burden third persons in violation of Rule 4.4(a); committing a criminal act, simple assault, in violation of Rule 8.4(b); and engaging in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Rules of Professional Conduct.

EVIDENCE

The ODC offered into evidence the following exhibits at the hearing of this matter:

> ODC1 – Complaint of Michael and Mitch Kimball forwarded to ODC by John M. Madison, III.
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> ODC2 – Response to complaint dated September 23, 2011 from Leslie Schiff without attachments.
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> ODC3 – Reply to response by Mitch and Michael Kimball dated October 18, 2011.
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> ODC4 – Reply to response by John M. Madison, III.
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> ODC5 – Motion and Order placing Mr. DeJean on 2 years' probation N06-DB-057 dated November 10, 2006.
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> ODC6 – November 10, 2008 notice of successful completion of probation.
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> ODC7 – Admission issued to Mr. DeJean in 09-ADB-018 dated December 1, 2009.
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> ODC8 – Admission issued to Mr. DeJean in 09-ADB-014 dated December 1, 2009.
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> ODC9 – Court order imposing public reprimand on Mr. DeJean dated April 30, 2010.
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> ODC10 – May 20, 2008 extension of LAP contract by Mr. DeJean to October 19, 2011.

The OCD exhibits 1 – 10 were admitted into evidence by the Committee Chair. The Chair, however, refused to admit into evidence ODC Exhibit 11 which purported to be a transcript of a November 4, 2008 argument over a fee dispute between Mr. DeJean and a former client, Jerriel Bazile. This exhibit was proffered as ODC Proffer 1.[2] The Committee Chair felt that this transcript was irrelevant as it pertained to the pending charges against the Respondent

[2] R. 103.

and further found it to be inadmissible hearsay. The ODC called as witnesses at the trial of this case the following individuals: The Respondent, Felix Anthony DeJean, IV; Mitch Kimball; Michael Kimball; John M. Madison, III; and Buddy Stockwell, Executive Director of the Lawyers Assistance Program.

The Respondent introduced into evidence the following exhibits:

> R1 – A letter from Mitch Kimball to the Office of ODC dated March 7, 2012.
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> R2 – A letter from Michael Kimball to the Office of Disciplinary Counsel dated March 7, 2012.
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> R3 – A letter from John M. Madison, III to the Office of Disciplinary Counsel dated March 7, 2012.
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> R4 – An in globo exhibit of photographs depicting the Respondent's conference room where the incident involving the formal charges arose and the spacing around the table in the conference room.
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> R5 – Curriculum Vitae of Burl E. Forgey, IV, MD.

On behalf of the Respondent, the following witnesses testified: Jonathan Shane Grimmitt; Johnny Grimmitt; the Respondent; and Dr. Burl Forgey.

FINDINGS OF FACT

There is no dispute that an incident occurred in the Respondent's office on August 26, 2011, during which tempers flared and the Respondent used inappropriate language with Mitch and Michael Kimball, and their attorney, John Madison, III, the Complainants in this matter. The informal settlement conference, which was held subsequent to a failed mediation that had occurred three weeks prior, was scheduled at the request of Mr. Madison to work on trying to resolve a case that was pending against his clients, Michael and Mitch Kimball.[3] Present at this informal settlement conference were Mr. Madison's clients, Michael and Mitch Kimball, and

[3] R. 129.

respondent's clients, Jonathan Shane Grimmitt and his father, Johnny Grimmitt.[4] During the conference, the Kimballs offered Shane Grimmitt what the Respondent and his clients considered to be, an insulting offer to settle the pending litigation. After the Respondent and the Grimmitts discussed the settlement offer that was proposed by the Kimballs during this informal settlement conference and the Kimballs came back into the respondent's conference room, the Respondent proceeded to cross examine the Kimballs about what he considered to be forged signatures and fraudulent documentation involving the litigation that they were trying to resolve. In the Respondent's opinion, he was outlining for the Kimballs what he perceived to be the strength in the Grimmetts' case against the Kimballs and made the comment that he was going to 'nail you (referring to the Kimbles) down like Pontius Pilot and the nail driving five.'[5] According to the respondent, he was referring to his intent to succeed in Court in the pending litigation.

The Kimballs interpreted the Respondent's tone of voice and mannerisms as overly aggressive and threatening. Likewise, Mr. Madison felt that the tone of the discussion between the Respondent and his clients had stepped over the line of intellectual discourse about the substance of the pending litigation and disputed factual issues. It is unclear to the Committee, given the contradictory testimony, who stood up first and/or who made a movement that would have been considered physically threatening to the Complainants, their lawyer, and/or the Respondent. However, the Committee notes that there was absolutely no physical contact between the Complainants or the Respondent.[6] The Complainants described the incident as "a misunderstanding."[7] Mr. Madison described the incident as "unfortunate."[8] The Respondent

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[4] R. 127.
[5] R. 137.
[6] R. 29, 37, 62, 109, 120, 142.
[7] R. 29, 44.

advised that the incident should not have occurred in the fashion that it did, but that he felt threatened by the behavior of the Kimballs in standing up above him in his small conference room which precipitated his subsequent reaction in asking them to leave his office and using derogatory and vulgar terms.[9]

The Committee further notes that the litigation which the parties were seeking to settle informally on August 26, 2011 did ultimately resolve in March of 2012.[10] The Complainants also testified that they forwarded letters to the Office of Disciplinary Counsel, as part of their effort to resolve the pending litigation, noting their intent to withdraw the complaint that forms the basis of the current disciplinary matter. The Committee further notes that the Complainants' decision to unilaterally withdraw the allegations against the Respondent which form the basis of the current complaint, have absolutely no bearing on the Committee's review of the facts and circumstances herein.

However, after a careful review of the witnesses' testimony in this case, as well as the rules cited by the Office of Disciplinary Counsel as part of their formal charges, it is the Committee's opinion that the evidence, when taken as a whole, does not meet the clear and convincing standard of proof that the Respondent violated Rule 4.4(a); Rule 8.4(b); or Rule 8.4(d).[11] As it pertains to Rule 4.4(a), the incident which occurred during the settlement conference at the Respondent's office on August 26, 2011, did not embarrass or burden a third party as those terms are used in that Rule. The Respondent allowed the emotional intensity and strength that he felt about his clients' case to guide his interactions with the Kimballs, which was clearly unprofessional. However, the explanation provided by the Respondent in terms of him

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[8] R. 76.
[9] R. 138, 159.
[10] R. 60.
[11] *In re: Banks*, 09-1212 (La. 10/2/09), 18 So. 3d 57.

feeling threatened by the Kimballs in his small conference room was not contradicted by the evidence submitted by the ODC. There was absolutely no evidence to suggest that the Respondent intentionally sought to embarrass or burden the Kimballs or their attorney when the informal settlement conference degraded into the incident which forms the basis of this complaint.[12] Therefore, the Committee does not believe that the ODC has demonstrated a violation of Rule 4.4 (a).

The ODC has also alleged that the Respondent committed a simple assault in violation of Rule 8.4(b). All of the evidence, including the written documentation and the witness testimony, established that there was no physical contact between the Respondent, nor any of the Complainants in this matter. Therefore, the Committee believes that the ODC has failed to demonstrate that a simple assault occurred and, therefore, under the clear and convincing evidence standard, the ODC has failed to meet its burden of proof in demonstrating a violation of Rule 8.4(b).[13]

Finally, with reference to the catch-all Rule 8.4(d), the Committee finds that the ODC has failed to meet its burden of proof in demonstrating that the incident on August 26, 2011 was conduct prejudicial to the administration of justice as that rule has been interpreted by the Louisiana Supreme Court. The Committee believes that the ODC has attempted to use prior acts by the Respondent, including prior probations and admonitions to prove their its current case against the Respondent and attempt to meet the burden of proof of clear and convincing evidence as it pertains to a Rule 8.4(d) violation. The Committee believes it is improper for the ODC to use prior acts, admonitions, or prior reprimands or other disciplinary history, particularly acts

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[12] The Committee also felt that the testimony of the respondent's clients, Shane and Johnny Grimmitt, was persuasive as it pertained to the impact of the incident. The Grimmitts were not distraught over the incident, nor did they hold against their attorney. Ultimately, they were very pleased with the respondent's representation of their case and the manner in which the litigation was concluded.

[13] R. 29, 37, 62, 109, 120, 142.

which are not related in any way, shape, or form to the behavior involving the current matter, as a means of establishing some sort of pattern or behavior to meet the clear and convincing standard of proof.

Particularly, the ODC sought to use the testimony of Buddy Stockwell, the executive director for the Lawyer's Assistance Program, to attempt to demonstrate that the Respondent had not been participating in a LAP supervised agreement since October of 2010, pursuant to a withdrawal.[14] Whether or not this withdrawal was voluntary was never addressed and Mr. Stockwell did not have any personal knowledge about the Respondent's history with the LAP program in order to determine whether or not the contract he was under in October of 2010 was voluntary or mandatory. However, in the ODC exhibits, ODC6 demonstrated that the Respondent had completed successfully probation as of November 10, 2008, through the LAP program. No other documentation provided by the ODC as part of its exhibits demonstrated that the Respondent was required to be under LAP's supervision during 2010 or thereafter. Nor was there any evidence that the respondent was abusing alcohol or drugs at the time of the incident.

The Respondent called as a witness, Dr. Forgey, a psychiatrist whose care he has been under continuously since August 15, 2001.[15] Dr. Forgey testified that he sees the Respondent every three to four months and has over the last ten years.[16] He further testified that he treats the Respondent for a bipolar condition and further testified that he did not believe any of the behavior demonstrated by the Respondent under the facts of the incident involving this particular case was due to the Respondent's mood disorder.[17] Dr. Forgey reiterated the Respondent's position, which was communicated to Dr. Forgey within a short timeframe after the incident

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[14] R. 79.
[15] R. 165.
[16] R. 166.
[17] R. 169.

itself, that the Respondent felt physically intimidated during the interaction with the Kimballs which was why he overreacted and became verbally aggressive.[18] Based on Dr. Forgey's testimony, which was uncontradicted by the ODC, the Committee feels compelled to find that the incident which involves the current complaint did not arise out of the Respondent's prior medical or prior substance abuse problems which had been outlined in ODC5. Finally, a review of applicable case law further supports the Committee's decision that the charges should be dismissed.

The ODC cited the case of *In Re: Estiverne*, 741 So.2d 649, 99-0949 (La. 09/24/99), as support for its position that not only was there a rule violation in this case, but the Respondent should receive a suspension. Mr. Estiverne, during a deposition, became involved in a verbal altercation with opposing counsel, Robert Bonnaffons, at which time both attorneys discussed stepping outside and settling the matter "man to man." Subsequent to that verbal altercation, the Respondent left the room and reappeared in the office with a handgun. According to the testimony elicited from Mr. Bonnaffons, the Respondent threatened to kill him and pointed the gun at his chest, and cocked the gun by pulling back the hammer. During the hearing involving the claims against Mr. Estiverne, there was conflicting and contradictory evidence as to who was the aggressor as well as whether the Respondent felt the need to defend himself. Nonetheless, the Committee takes note that the use of a firearm, whether pointing it at another attorney or simply waiving it around is not even remotely close to the current factual scenario. The Committee further takes note that the Estiverne case involved additional charges against Mr. Estiverne for other rule violations which, combined with the handgun incident, resulted in a one year suspension.

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[18] R. 168.

The Committee also reviewed the decision from the Louisiana Supreme Court *In Re: Greenburg*, 9 So. 3d 802, 2008-2878 (La. 5/5/09), in which two attorneys who exchanged vulgarities and then had a physical altercation in open court were found to have violated the Professional Rules of Conduct. Because the incident involving the two attorneys took place in open court, the Committee hearing the *Greenburg and Lewis* matter found that "the attorneys' conduct was prejudicial to the administration of justice for their clients and for the decorum of the court."[19] Again, the fact that there was a verbal and a physical altercation in open court before a judge is a distinguishing set of facts than those that are before the Committee.

Finally, the Committee reviewed *In Re: Richard*, 50 So. 3d 1284, 2010-1479 (La. 11/30/10), where another Hearing Committee found a rule violation under Rule 8.4(d), but not for the physical altercation with the Respondent's elderly father which was set forth as a basis for the formal charges and discipline. Rather, the Committee found that by committing perjury during the hearing, the Respondent had engaged in conduct prejudicial to the administration of justice. The Board, however, did not agree, with this finding by the hearing committee. Due to the number and severity of rule violations committed, the respondent was disbarred for other rule violations involving the forging of medical records and the physical altercation with respondent's elderly father. These cases demonstrate that there is a distinction between a verbal altercation and a physical altercation where the former, under disputed facts, does not necessarily equate with a rule violation.

The fact that the litigation which revolved around the incident forming the basis of these formal charges was ultimately resolved favorably for all of the parties as they all testified under oath, and there was no delay based on the verbal altercation that occurred at the Respondent's office on August 26, 2011, the Committee finds that the ODC has failed to meet its burden of

[19] *Greenburg* at 806.

proof in establishing a violation of Rule 8.4 (d). There simply was not sufficient evidence to impute guilt on the Respondent given his prior disciplinary history and the facts of the incident involving the current formal charges. The Committee agrees that the behavior exhibited by the Respondent was clearly unprofessional. However, the behavior, as outlined in the disputed facts, falls short of establishing by clear and convincing evidence a rule violation and, therefore, sanctions are not warranted.

RULES VIOLATED

The ODC failed to establish by clear and convincing evidence a rule violation.

SANCTION

Because the Committee has found no rule violation was proved by ODC, sanctions are not warranted.

CONCLUSION

For the reasons stated above, the Committee finds that the ODC has failed to prove by clear and convincing evidence a violation of any of the Rules of Professional Conduct as set forth in its formal charges and, therefore, the Committee finds that the charges against the Respondent should be dismissed.

However, the Committee wants to make very clear that its decision to dismiss the charges and find that the ODC has not met its burden of proof should not in any way be interpreted as consent to or agreement with the actions taken by the Respondent on August 26, 2011. Clearly, the Respondent has a history with the ODC for reasons outlined in the exhibits introduced at the hearing of this matter.[20] Therefore, the Respondent should take note that considering his history,

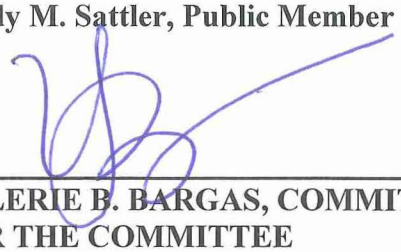
[20] ODC5, ODC6, ODC7, ODC8, ODC9, and ODC10.

any rule violations in the future would likely result in a severe penalty such that he should take great care to avoid even the appearance of impropriety.

Baton Rouge, Louisiana, this 20th day of November, 2012.

Louisiana Attorney Disciplinary Board
Hearing Committee #57

Valerie B. Bargas, Committee Chair
Alexis S. Luker, Lawyer Member
Cindy M. Sattler, Public Member



BY: VALERIE B. BARGAS, COMMITTEE CHAIR
FOR THE COMMITTEE